A

Yee Ah Fern v Alliance Bank Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–123 OF 2002

B

MOHD HISHAMUDIN J

5 DECEMBER 2008

C *Contract — Breach — Charge instrument — Overdraft facility — Unlawfully increased — Whether consent of chargors obtained — Whether plaintiff consented to the increase — Liability under charge — Whether plaintiff automatically discharged of charge — Charged property auctioned — Whether plaintiff unlawfully deprived of his property — Whether entitled to be compensated*

D

Evidence — Burden of proof — Overdraft facility — Unlawfully increased — Plaintiff denied signing alleged consent letter — Whether legal burden on defendant to prove signature was plaintiff's — Whether inference could be made E *that signature was plaintiff's — Evidence Act 1950 s 103*

Land Law — Charge — Overdraft facility — Default in repayment — Foreclosure proceeding — Order for sale granted — Whether matter res judicata F *— Whether plaintiff estopped from raising issues on absence of consent, knowledge and forgery — Whether earlier judgment or decree final*

The plaintiff's claim against the defendant bank was for damages for breach G of contract that resulted in the plaintiff losing a property that he had charged to the defendant as a security for an overdraft given by the defendant to a third party. The plaintiff and his brother, PW2, were the registered co-proprietors of a single storey terrace house in Kuala Lumpur. The said property was charged to the defendant bank as a security for a RM60,000 H overdraft. The overdraft was meant for PW2, who ran a used car business. Both the plaintiff and PW2 had executed the charge instrument pursuant to the National Land Code. The defendant bank had on 2 May 1987, without the consent and knowledge of the plaintiff/co-chargor, increased the overdraft facility by RM30,000 to RM90,000. In order to secure the additional I RM30,000, the defendant had, on 8 May 1987, caused the charge instrument to be upstamped to RM90,000. After this unlawful increase in the amount of the overdraft facility, it was alleged by the defendant bank that the plaintiff and PW2 defaulted on the repayments. Thereafter, the defendant commenced foreclosure proceedings against the chargors, the plaintiff and

PW2. A consent letter purportedly signed by both the plaintiff and PW2 authorising the bank's solicitors to upstamp the charge in respect of the additional overdraft facility of RM30,000 was discovered. The plaintiff denied having signed the letter and having had any knowledge of the overdraft increase and the upstamping. PW2 however, did not deny signing that letter. The plaintiff, having had sight of the alleged consent letter, immediately lodged a police report alleging that someone had forged his signature on the so-called consent letter. Despite the contest to the charge action, nevertheless, on 29 October 2001 an order for sale was granted by the Shah Alam Court, and the property was auctioned at the reserved price of RM205,000, and sold off at RM210,000 to the successful bidder at the auction. The plaintiff, aggrieved by the sale order, then commenced the present writ action against the defendant claiming that by reason of the breach of cl 7 of the charge annexure on the part of the defendant and the consequential charge action by the plaintiff, who had taken advantage of their own breach, he had suffered the loss of his property. The plaintiff was seeking, among others, damages equivalent to half of the value of the property as valued by the defendant's valuer (as being a co-owner he had only half share in the property). In opposing the plaintiff's claim, the defendant raised two issues. Firstly, it was submitted that the plaintiff did in fact consent to the increase of the overdraft to RM90,000. Secondly, that with the sale order by the High Court of Shah Alam, the matter was now res judicata and the plaintiff was estopped from raising the issue of the absence of consent and knowledge on his part and the issue of forgery.

Held, allowing the plaintiff's claim with costs:

(1) After the defendant had unlawfully (in breach of cl 7 of the charge annexure and s 246(1)(a) of the National Land Code) increased the overdraft facility of the borrower to RM90,000, and purported to secure this new amount of RM90,000 on the same security (ie, to have it charged on the same property), the plaintiff was as a matter of law automatically discharged of the charge, and he was exonerated from any liability under the charge. And as a consequence, he could not be held liable for any default on the part of the borrower committed after the unlawful increment. Since the increase was in breach of cl 7 and was thus unlawful, the purported upstamping was of on no legal effect. In other words, the upstamping was invalid (see para 21).

(2) The defendant was unable to offer any evidence to establish that the signature on the letter was that of the plaintiff's. The court cannot make the inference that the signature on the letter must be that of the plaintiff's just because the plaintiff's name was written just below the alleged signature — all the more so when in the first place there was no

A evidence adduced as to who had written the letter; and when there was the evidence of PW2 to the effect that when he signed the letter he observed that the space meant for the plaintiff's signature was still blank (see para 25).

B (3) The principle of res judicata could not be invoked by the defendant as the order for sale made by the Shah Alam High Court was not a final judgment or a decree. The Shah Alam High Court did not issue any grounds of judgment. The court was in no position to make an inference or to speculate that the Shah Alam High Court did make such
C a finding on the forgery issue merely by relying on the fact that an order for sale was made by that court (see paras 30 & 33).

[Bahasa Malaysia summary

D Tuntutan plaintif terhadap defendan adalah untuk kerugian-kerugian bagi kemungkiran kontrak yang mengakibatkan plaintif kehilangan hartanah yang dia telah gadaikan kepada defendan sebagai jaminan untuk satu overdraf yang diberi oleh defendan kepada pihak ketiga. Plaintif dan abangnya, PW2, adalah pemilik berdaftar sebuah rumah teres satu tingkat di Kuala Lumpur.
E Hartanah tersebut digadaikan kepada defendan sebagai satu jaminan untuk overdraf sebanyak RM60,000. Overdraf tersebut dimaksudkan untuk PW2, yang menjalankan satu perniagaan kereta terpakai. Kedua-dua plaintif dan PW2 telah menandatangani gadaian menurut Kanun Tanah Negara. Defendan bank telah pada 2 Mei 1987, tanpa persetujuan dan pengetahuan
F plaintif/penggadai bersama, menambah kemudahan overdraf sebanyak RM30,000 kepada RM90,000. Bagi mendapatkan penambahan RM30,000, defendan telah, pada 8 Mei 1987, membuatkan surat cara gadaian tersebut ditambah kepada RM90,000. Selepas peningkatan tidak sah dalam jumlah kemudahan overdraf ini, defendan mendakwa bahawa plaintif dan PW2
G gagal dalam pembayaran balik. Selepas itu, defendan memulakan prosiding halang tebus terhadap pengadai-pengadai, plaintif dan PW2. Sepucuk surat keizinan yang dikatakan ditandatangani oleh kedua-dua plaintif dan PW2 memberi kuasa kepada peguam cara bank untuk menambah gadaian tersebut berkenaan dengan penambahan kemudahan overdraf sebanyak RM30,000
H telah ditemui. Plaintif menafikan menandatangani surat tersebut dan mempunyai sebarang pengetahuan bagi penambahan overdraf dan tambahan gadaian tersebut. PW2 bagaimanapun, tidak menyangkal menandatangani surat tersebut. Plaintif, setelah melihat surat keizinan tersebut, lantas membuat laporan polis yang menyatakan bahawa seseorang telah
I memalsukan tandatangannya pada surat keizinan tersebut. Walaupun wujudnya pertikaian terhadap tindakan gadaian tersebut, pada 29 Oktober 2001 satu perintah jualan telah diberikan oleh Mahkamah Shah Alam, dan hartanah tersebut telah dilelong pada harga rizab sebanyak RM205,000, dan dijual pada harga RM210,000 kepada pembida yang berjaya semasa lelongan.

Plaintif, terkilan dengan perintah jualan tersebut, kemudiannya memulakan tindakan writ ini terhadap defendan mendakwa bahawa disebabkan oleh kemungkiran klausa 7 lampiran gadaian oleh defendan dan akibat tindakan gadaian tersebut oleh plaintif, yang telah mengambil kesempatan atas kemungkiran mereka sendiri, dia telah kehilangan hartanahnya. Plaintif memohon, antara lain, kerugian-kerugian bersamaan separuh nilai hartanah tersebut seperti yang dinilai oleh penilai defendan (sebagai pemilik bersama dia hanya mempunyai kongsi separuh hartanah tersebut). Dalam menentang tuntutan plaintif itu, defendan membangkitkan dua isu. Pertamanya, telah dihujahkan bahawa plaintif sememangnya memberi keizinan untuk penambahan overdraf kepada RM90,000. Keduanya, bahawa dengan perintah jualan oleh Mahkamah Tinggi Shah Alam, perkara ini sekarang adalah res judicata dan plaintif diestop daripada membangkitkan isu ketiadaan keizinan dan pengetahuan olehnya dan isu pemalsuan.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Selepas defendan dengan tidak sahnya (dalam kemungkiran klausa 7 lampiran gadaian dan s 246(1)(a) Kanun Tanah Negara) menambah kemudahan overdraf peminjam kepada RM90,000, dan bermaksud untuk menjamin jumlah baru RM90,000 ke atas cagaran yang sama (iaitu, untuk mengadai atas hartanah yang sama), plaintif, dari segi undang-undang secara automatik dilepaskan daripada gadaian, dan dia dibebaskan daripada sebarang liabiliti di bawah gadaian. Dan akibat daripada itu, dia tidak mungkin dipertanggungjawabkan untuk apa-apa keingkaran yang dilakukan oleh peminjam selepas penambahan tidak sah tersebut. Kerana penambahan tersebut memungkiri klausa 7 dan oleh itu tidak sah, penambahan gadaian tersebut tiada kesan undang-undang. Dengan erti kata lain, penambahan gadaian tersebut tidak sah (lihat perenggan 21).

(2) Defendan tidak mampu memberikan sebarang bukti untuk membuktikan yang tandatangan pada surat itu adalah tandatangan plaintif. Mahkamah tidak boleh membuat inferens bahawa tandatangan pada surat itu mestilah tandatangan plaintif hanya kerana nama plaintif ditulis di bawah tandatangan tersebut — lebih-lebih lagi tidak ada bukti dikemukakan siapakah yang menulis surat tersebut; dan apabila terdapat keterangan PW2 yang menyatakan apabila dia menandatangani surat tersebut dia mendapati bahawa ruang yang dimaksudkan untuk tandatangan plaintif masih kosong (lihat perenggan 25).

(3) Prinsip res judicata tidak boleh digunakan oleh defendan kerana perintah jualan yang dibuat oleh Mahkamah Tinggi Shah Alam bukanlah satu penghakiman atau perintah muktamad. Mahkamah

Tinggi Shah Alam tidak mengeluarkan sebarang alasan penghakiman. Mahkamah tidak boleh membuat inferens atau spekulasi bahawa Mahkamah Tinggi Shah Alam telah membuat keputusan tentang isu pemalsuan tersebut hanya dengan bergantung pada fakta bahawa satu perintah penjualan telah dibuat oleh mahkamah tersebut (lihat perenggan 30 & 33).]

Notes

For cases on breach in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2516–2749.

For cases on burden of proof in general, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 303–598.

For cases on charge in general, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2157–2469.

Cases referred to

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, SC (refd)

Low Lee Lian v Bee Hin Lee Bank Bhd [1997] 1 MLJ 77, FC (folld)

Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257, SC (folld)

Legislation referred to

Evidence Act 1950 s 103

National Land Code ss 242(1), 246, 246(1), (1)(a), (2), (2)(a), 256, Forms 16A, 16D

Peter Siew (Peter Siew & Tan) for the plaintiff.

TS Chin (Anad & Noraini) for the first defendant.

Mohd Hishamudin J:

[1] The plaintiff's claim against the defendant bank is for damages for breach of contract that resulted in the plaintiff losing a property that he had charged to the defendant as a security for an overdraft given by the defendant to a third party (there is also an alternative claim in negligence which I think it is not necessary for me to deal with).

[2] I have allowed the plaintiff's claim with costs.

[3] The plaintiff, Yee Ah Fern, and his brother (Yee Eh Min — PW2) were the registered co-proprietors of a property which they had charged to the defendant bank as a security for a RM60,000 overdraft. The property is a single storey terrace house in Kuala Lumpur held under HS(D) 16478 Lot 8912 Mukim of Kuala Lumpur.

[4] At the time of the transaction, the defendant bank was known as the Multi-Purpose Bank Bhd (and prior to 1 March 1996 it was known as the Malaysian French Bank Bhd). At the time of the filing of the present writ action the defendant was (and still is) known as the Alliance Bank Malaysia Bhd.

[5] The overdraft was only meant for the plaintiff's brother, PW2. PW2 ran a used car business and he needed the overdraft for the business. In other words, the borrower was only PW2. The plaintiff is only a chargor (the other co-chargor being PW2 ie the borrower himself).

[6] In accordance with normal banking practice, both the plaintiff and PW2, on 18 March 1986, executed the charge instrument pursuant to s 242(1) and Form 16A of the National Land Code. The charge instrument operates as a contract between the chargors and the defendant bank — the chargee. Clause 7 of the charge annexure (which is part of the charge instrument) stipulates that the chargee bank must obtain the consent of the chargors before they can lend to the borrower an amount in excess of the overdraft limit of RM60,000. I shall set out the provision of this clause. It reads:

Further Advances

7 The Bank may at its discretion from time to time at the request of the Customer(s) and subject to the consent of the Chargor advance to the Customer(s) such further sum or sums of money beyond the limit hereinbefore mentioned as the Bank may deem fit and such sum or sums so advanced shall form part of the money hereby secured.

[7] What had been done by the chargee, purportedly pursuant to cl 7, is what is known under the National Land Code as the 'tacking' of further advance. This cl 7 must be read with s 246 of the National Land Code. This provision stipulates (for the purpose of this judgment I shall only be referring to sub-s (1) and (2):

246 Tacking of further advances

(1) Notwithstanding any other provision of this Act, any chargee may, in circumstances specified in paragraph (a) or (b) of subsection (2), make further advances (including, where appropriate, advances consisting of the giving of additional credit) to rank in priority to any subsequent charge of the same land or lease.

(2) The said circumstances are —

(a) Where the making of the advance or advances in question is

A expressly authorised by the prior charge, or the purpose of that charge is to secure the balance from time to time due to the chargee under any current or continuing account; or

(b) Where the advance or advances in question are made with the consent of the person entitled to the benefit of the subsequent charge.

B

[8] The insertion of such a clause as cl 7 in the charge annexure is legal under the National Land Code by virtue of the words:

C

(a) Where the making of the advance or advances in question is expressly authorised by the prior charge,

appearing in para (a) of sub-s (2) of s 246. But cl 7 in authorising the making of a further advance imposes a condition, that the consent of the chargor must first be obtained.

D

[9] Now, in the light of what I am going to say next, I shall at this juncture stress that for a chargee to disregard this condition amounts to a disregard or a breach of cl 7, and to disregard or to breach cl 7 in making any further advance is to make a further advance in a manner not 'expressly authorised by the prior charge'; and this in turn is a breach of s 246(1)(a) of the National Land Code.

E

F **[10]** In the present case, however, the defendant bank, without the consent and knowledge of the plaintiff/co-chargor, that is to say, in breach of cl 7 of the charge instrument (it follows then that it was also a breach of s 246(1)(a) of the National Land Code), had on 2 May 1987 increased the overdraft facility by RM30,000 so as to increase the overdraft facility from RM60,000 to RM90,000 (The defendant, however, maintains that the increase of RM30,000 was with the consent of the plaintiff — but I will deal with this point later). In order to secure the additional RM30,000, the defendant caused the charge instrument to be upstamped to RM90,000 on 8 May 1987.

G

H

[11] After this unlawful increase in the amount of the overdraft facility, it is alleged by the defendant bank that the plaintiff and PW2 defaulted on the repayments (but the plaintiff denies any default on his part).

I **[12]** Thereafter, the defendant on 9 March 1998 commenced foreclosure proceedings against the chargors (that is the plaintiff and PW2) pursuant to s 256 of the National Land Code by filing an originating summons at the High Court of Shah Alam. The plaintiff was not aware of the proceedings as he was then in Australia. PW2 informed the plaintiff by phone about the

charge action. On being so informed, the plaintiff returned home from Australia on 5 November 1999; and engaged solicitors to oppose the charge action. His solicitors obtained the cause papers, and from the cause papers he came to know about a letter allegedly jointly signed by him and PW2 addressed to the bank's then solicitors, Messrs Low Hop Bing and Associates. The letter dated 2 May 1987 states that both the plaintiff and PW2 had been informed by the defendant bank that PW2's overdraft facility had been increased by RM30,000 to RM90,000; and that both the plaintiff and PW2 authorised the bank's solicitors to upstamp the charge in respect of the additional overdraft facility of RM30,000.

[13] PW2 does not deny signing that letter. But the plaintiff denies having signed the letter and having had any knowledge of the overdraft increase and the upstamping.

(This upstamping procedure appears to be authorised by cl 46 of the charge annexure. The legality of this clause does not appear to be an issue, but it is common ground that the increase in the overdraft requires the consent of the chargors).

[14] The plaintiff, having had sight of the alleged consent letter, immediately lodged a police report at Setapak Police Station, Kuala Lumpur, on 6 November 1999, alleging that someone had forged his signature on the so-called consent letter.

[15] At this juncture it is convenient to refer to the evidence of the co-chargor cum borrower, PW2, who gave an account as to how the overdraft facility was increased by RM30,000 to RM90,000, and how he came to sign the alleged consent letter. PW2 said he had never defaulted on the repayments of the RM60,000 overdraft (and this evidence does not appear to be seriously disputed). But, however, having used up the overdraft of RM60,000 he found out that he needed more cash for his business. So he approached one Mr Yew Tong Leong ('Yew'), the manager of the defendant's Subang Jaya branch office. Yew agreed to increase the facility by another RM30,000. According to PW2, after the RM30,000 had been disbursed by the defendant, he was asked by Yew to come to the latter's office to sign a letter, which he did. This letter is the alleged consent letter referred to earlier. PW2 noticed that the plaintiff's name appeared next to his name but that the space meant for the plaintiff's signature was still blank. Yew asked PW2 about obtaining the plaintiff's signature, and PW2 informed Yew that the plaintiff was overseas. Yew then told PW2 that for the time being his (PW2's) signature 'was sufficient'.

[16] This letter was carbon copied to the Malaysian French Bank Bhd (as the bank was then known), Subang Jaya branch, for the attention of one of the bank's officers by the name of Mr Chan Kok Leong ('Chan').

[17] Now, reverting to the defendant's charge action at the High Court of Shah Alam, the defendant bank issued the Form 16D in January 1998 claiming a sum of RM256,100.67. PW2 did not oppose the foreclosure proceedings. But the plaintiff did oppose the originating summons application by filing an affidavit alleging that he had no knowledge of the letter and the upstamping, and had never consented to any increase in the amount of the overdraft and that the alleged signature of his in the alleged consent letter (relied upon by the defendant) was a forgery.

[18] Despite the contest to the charge action, nevertheless, on 29 October 2001 an order for sale was granted by the Shah Alam court, and the property was auctioned at the reserved price of RM205,000, and sold off at RM210,000 to a third party — the successful bidder at the auction.

[19] The reserved price was based on a valuation report tendered by the defendant (the plaintiff in the originating summons at the Shah Alam High Court) at the charge action proceeding.

[20] The plaintiff, aggrieved by the sale order, then commenced the present writ action against the defendant on 4 February 2002 claiming that by reason of the breach of cl 7 of the charge annexure on the part of the defendant and the consequential charge action by the plaintiff, who had taken advantage of their own breach, he had suffered the loss of his property. The plaintiff is seeking, among others, damages equivalent to half of the value of the property as valued by the defendant's valuer (as being a co-owner he had only half share in the property).

[21] In my judgment, after the defendant had unlawfully (unlawfully because it was in breach of cl 7 of the charge annexure and s 246(1)(a) of the National Land Code) increased the overdraft facility of the borrower to RM90,000, and purported to secure this new amount of RM90,000 on the same security (ie to have it charged on the same property), the plaintiff was as a matter of law automatically discharged of the charge, and he is exonerated from any liability under the charge. And as a consequence, he could not be held liable for any default on the part of the borrower committed after the unlawful increment (which was what happened in the present case). Since the increase was in breach of cl 7 and was thus unlawful, the purported upstamping was of on no legal effect. In other words, the upstamping was invalid.

[22] In opposing the plaintiff's claim, the defendant raises only two issues. Firstly, it is the submission of the defendant that the plaintiff did in fact consent to the increase of the overdraft to RM90,000.

[23] Secondly, it is the defendant's contention that with the sale order by the High Court of Shah Alam, the matter is now res judicata.

[24] I shall begin with the first issue. It is a question of evidence. In raising this issue, the defendant relies mainly on the alleged consent letter. The defence maintains that the signature on the letter is that of the plaintiff (the other signature being that of PW2). The plaintiff, however, denies that the alleged signature on the consent letter was his. Now, this being the case, the legal burden is on the defendant to prove on a balance of probabilities that the signature on the letter is that of the plaintiff. Section 103 of the Evidence Act 1950 states:

> 103 Burden of proof as to particular fact
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[25] In the instant case, the defendant wishes the court to believe that the signature on the letter is that of the plaintiff. By reason of the above provision, the defendant must come up with the evidence. However, the defendant was unable to offer any evidence to establish that the signature on the letter was that of the plaintiff. The court cannot make the inference that the signature on the letter must be that of the plaintiff just because the plaintiff's name is written just below the alleged signature — all the more so when in the first place there is no evidence adduced as to who had written the letter; and when, instead, as has been pointed out, there is the evidence of PW2 to the effect that when he signed the letter he observed that the space meant for the plaintiff's signature was still blank.

[26] The defendant called only one witness, that is, Mr Chak Sen Fung (DW1), an officer with the defendant bank in charge of the Consumer Collections Mortgage Department. However, DW1's evidence does not throw any light on the letter. He joined the defendant bank only in March 1998, whereas the alleged letter was dated 2 May 1987. He has no personal knowledge of what transpired in 1987. He has no personal knowledge about the letter. His evidence of what transpired in 1987 was based purely on the records in the possession of the bank. He asserts that the signature is that of the plaintiff. But it is just a bare assertion. No one was called who could say that he saw the plaintiff signed the letter. And DW1 could not produce any admissible documentary evidence to show that the signature on the letter in

question is that of the plaintiff. Now, it is to be recalled that PW2 in his evidence said that when he signed the alleged consent letter at Yew's office he noticed that the space meant for the plaintiff's signature was blank. His evidence on this point was not challenged by the defence; nor was he cross-examined on this particular evidence. How then could the alleged signature of the plaintiff subsequently appear on the letter? It is incumbent on the defendant to explain this. And this the defendant fails to do. And if I may add here, there is this disquieting observation. DW1 also fails to explain as to why the letter (allegedly by the chargors) was addressed directly to the defendant's solicitors and not to the defendant themselves. Messrs Low Hop Bing was not the chargors' solicitors. They were the defendant's solicitors. Appropriately the letter should have been addressed to the defendant, and thereafter it is the defendant who should be giving instruction to their solicitors on the upstamping.

[27] DW1 in his evidence points out that the plaintiff did not call any expert witness to testify giving an opinion that the signature on the letter was not that of the plaintiff. With respect, this is maintaining a position that is contrary to the law of evidence. The legal burden is not on the plaintiff. By reason of s 103 above, as a matter of law, if at all, it is for the defendant, and not the plaintiff, to call an expert witness, to prove that the signature is that of the plaintiff.

[28] As I see it, two persons who could have thrown light on this issue about the plaintiff's signature were Yew (the Subang Jaya branch manager) and Chan (the officer at the Subang Jaya branch to whom the alleged consent letter was carbon copied). But Yew and Chan were not called as witnesses by the defendant. The only reason — and I think it is a very weak reason — as to why Yew and Chan were not called as witnesses by the defendant is that they were no longer working with the defendant bank and the defendant was not able to trace their whereabouts. But the defendant did not give any evidence as to when Yew or Chan left the employment of the defendant bank, or as to their last known address, or as to the efforts taken by the defendant to trace them.

[29] There are also further observations that I wish to make of DW1's evidence and they are that, firstly, he admitted that there was a further advance of about RM10,000 to RM15,000 made to PW2 (besides the further advance of RM30,000), that was made without the consent of the plaintiff; and, secondly, DW1 was not able to tell the court as to when the alleged default by PW2 took place. This is what he said in evidence:

Q: I put it to you that the borrower did not default on this overdraft of RM60,000?

A: I disagree.

Q: When did he default?

A: I do not have the record at the moment.

[30] Now coming to the second issue, with respect I am unable to accept the argument that, in the light of the order for sale made by the Shah Alam High Court, the principle of res judicata applies, and that the plaintiff is now estopped from raising the issue of the absence of consent and knowledge on his part and the issue of forgery. It is, however, true, as contended by the defence, that the same issues had already been canvassed by the plaintiff at the Shah Alam High in the charge action proceeding; and that the plaintiff did not appeal against the sale order (but nor were there any grounds of judgment issued by the High Court of Shah Alam for the decision). But be that as it may, in my view, the principle of res judicata cannot be invoked by the defendant as the order for sale made by the Shah Alam High Court is not a final judgment or a decree. The case law authorities are clear regarding the juridical nature of a sale order made under the National Land Code. In *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 Eusoff Chin SCJ (as he then was) said:

> The principles governing the matter are well settled by the authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our courts which have correctly stated the law upon the subject.
>
> ...
>
> It is equally settled law that in order for the doctrines of res judicata, cause of action estopple or issue estopple to apply, the earlier proceedings must have resulted in a final judgment or decree: 16 *Halsbury's Laws of England* (4th Ed) para 1519. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree.

[31] The same principle is also enunciated by the Supreme Court in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257.

[32] Now, the plaintiff's action against the defendant/chargee is an action in personam. In this regard, in *Low Lee Lian v Bee Hin Lee Bank Bhd* [1997] 1 MLJ 77, Gopal Sri Ram JCA (as he then was) said (at p 89):

> We have said that s 256(3) must be read narrowly. It does not, however, follow from this that the chargor who is unable to satisfy the court of cause to the contrary is left without any remedy whatsoever. Allegations that fail to amount to cause to the contrary may, as observed earlier, nevertheless form the basis of an action in personam against the chargee.
>
> Take the facts of this very case. Based upon what we have said thus far, it is clear that the instant appellant failed to meet the requisite legal test of what amounts to a cause to the contrary. The judge therefore quite correctly made the order for sale.
>
> But that does not bring the matter to an end. It is open to the appellant to bring an action in personam for breach of contract against the bank based upon the first and second grounds of complaint advanced by counsel during argument, subject to the proof of any alleged breach as well as any defences that may be fairly available to the chargee, including the plea of limitation. However, it is no answer for the respondent to say that the appellant's claim is barred by issue estoppel or res judicata.
>
> A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estopple to operate against the chargor's action.

[33] It is also the submission of Mr Chin (learned counsel for the defendant) that the plaintiff cannot raise the issue of forgery before this court as the Shah Alam High Court has made a 'finding' that the alleged consent letter was not a forgery and had granted an order for sale. With respect, I am unable to accept this argument. As I have pointed out earlier, the Shah Alam High Court did not issue any grounds of judgment. In my view, I am in no position to make a inference or to speculate that the Shah Alam High Court did make such a finding on the forgery issue merely by relying on the fact that an order for sale was made by that court.

[34] Accordingly, the plaintiff, being a co-owner is entitled to be compensated in the sum equivalent to half of the value of the house. By reason of the foreclosure proceeding, which had been unlawfully commenced against him by the defendant, he had been unlawfully deprived of this property. I take the value of the whole house as being RM210,000. I am taking this as the value of the whole house because although the defendant's valuer valued the property at RM205,000 for the purpose of the foreclosure proceedings, however, the house was in fact sold at the public sale for RM210,000. To my mind, this latter figure (RM210,000) should

appropriately be taken as the value of the whole house (in any case the difference between the valuation figure (RM205,000) and the sale price (RM210,000) is only a mere RM5,000 and, moreover, the plaintiff's counsel has conceded that the sale price of RM210,000 should be taken as being the appropriate market value for the whole house). This means that the plaintiff is entitled to be compensated in the sum of RM105,000.

[35] In addition the plaintiff is also entitled to such other special and general damages incurred by him, but only if any, as a direct consequence of the foreclosure proceedings. The quantum, however, is to be assessed by the registrar.

[36] I am disallowing the items of damages prayed for in paras 10.4 and 10.5 of the statement of claim (the plaintiff has abandoned his claim for damages under para 10.3).

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed